

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GILBERT A. MARTINEZ,

Plaintiff,

vs.

Case No. 04-CV-74515
HON. GEORGE CARAM STEEH

DOUGLAS VASBINDER, and
SABINA WESTERN,

Defendants.

ORDER ACCEPTING APRIL 13, 2005 REPORT AND RECOMMENDATION (#17)
GRANTING DEFENDANTS' MOTION TO DISMISS (#14),
AND DISMISSING PLAINTIFF'S CLAIM FOR FAILURE TO EXHAUST
ADMINISTRATIVE REMEDIES

Pro se plaintiff Gilbert Martinez, a state prisoner at the G. Robert Cotton Correctional Facility in Jackson, Michigan, filed a complaint and motion for preliminary injunctive relief on November 18, 2004 alleging defendants Warden Douglas Vasbinder and Resident Unit Manager Sabrina Western are liable under 42 U.S.C. § 1983 for their deliberate indifferent to his serious medical need to be transferred to a smoke-free environment, in violation of the Eighth Amendment. Plaintiff's motion for injunctive relief was denied as moot on February 1, 2005 consistent with plaintiff's admission that he had been transferred to a smoke-free environment on December 27, 2004. Defendants filed a motion to dismiss on March 15, 2005 premised on plaintiff's failure to exhaust administrative remedies. The matter was referred to Magistrate Judge Donald Scheer, who issued an April 13, 2005 Report and Recommendation recommending that the motion be granted, and that plaintiff's

claims be dismissed for failure to exhaust as required by 42 U.S.C. § 1997e(a). Specifically, Magistrate Judge Scheer found that documentation attached to plaintiff's complaint established that defendants Vasbinder and Western were not previously named in plaintiff's prison grievances, and that plaintiff could not as a matter of law now cure this defect by filing new post-complaint grievances against the defendants. See Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002).

"A judge of the court shall make a de novo determination of those portions of a report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636 (b)(1)(C). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." Id. Plaintiff has not filed timely objections to the Report and Recommendation. The court has nonetheless reviewed the Report and Recommendation, and accepts it in its entirety. Accordingly,

IT IS ORDERED that Magistrate Judge Scheer's April 13, 2005 Report and Recommendation is hereby ACCEPTED as the findings and conclusions of this court. Plaintiff's claims are hereby DISMISSED without prejudice for failure to exhaust administrative remedies.

SO ORDERED.

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: May 11, 2005

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on May 11, 2005, by electronic

and/or ordinary mail.

s/Josephine Chaffee
Secretary/Deputy Clerk